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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

AYLEEN JAMES,

Petitioner,

vs.

NEWSWEEK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff, who had two pending employment discrimination complaints with the EEOC, engages in protected activity under Title VII of the Civil Rights Act of 1964 by telling management that her performance evaluation was unfair and she would seek "justice"?

LIST OF PARTIES

All parties in the courts below are listed in the caption to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ayleen James, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals opinion is reported at 2000 WL 536409 (2d Cir. May 2, 2000) and is reproduced in the Appendix at App. A-1. The district court issued a written opinion which is reported at 1999 WL 796173 (S.D.N.Y. Oct. 4, 1999). This opinion is reproduced at App. A-5.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 2, 2000. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees .... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

A. *Background*

In 1972, respondent, Newsweek, Inc., hired petitioner, Ayleen James, a black woman partially of Panamanian ancestry,

as a Researcher (Editorial Assistant) for the magazine. (JA 4).[1] Between January 1, 1980 and December 10, 1994, James served as a Writer/Researcher (Senior Editorial Assistant) in the Foreign section of the magazine. (JA 4-5). James applied for a series of positions from 1992 through 1994. Repeated denials of promotional opportunities caused her to file discrimination complaints with the Equal Employment Opportunity Commission.

B. *EEOC complaints*

On July 27, 1993, James filed an EEOC complaint alleging she was discriminatorily denied a promotion the prior November to the position of Associate Editor/Lifestyles section and denied a bureau internship in May 1993. (JA 324-25) ("Charge I").

On March 29, 1994, James filed an EEOC complaint alleging she was denied a promotion to the positions of State Department Correspondent and Reporter for the Nation and Lifestyles sections in retaliation for filing Charge I. (JA 326) ("Charge II"). The EEOC issued "right-to-sue" letters in October 1995 and July 1996. (App. A-17).

Respondent did not assert in the courts below that petitioner filed either EEOC complaint in bad faith.

C. *Events leading up to James' termination*

On June 1, 1994 James met with her superior, Ann McDaniel, to discuss why petitioner had not received a desired writing internship and why Newsweek had refused (for the fourth year in a row) to send her to the National Association of Black Journalists Conference that summer. (JA 381 ¶ 13(d)).

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[1] "JA" refers to the Joint Appendix filed in the Court of Appeals.

At this meeting, McDaniel explained that James was not a good ambassador for Newsweek because, *inter alia*, she had complained about the company and had a bad attitude. (JA 382 ¶ 13(d); JA 361 ¶ 89).

On December 9, 1994, James again met with McDaniel and another superior, Jolie Solomon, to discuss her work performance. McDaniel gave James her performance review for 1994, and did not tell James she was being terminated. Instead, McDaniel invited James to another meeting on January 25, 1995 to discuss further her performance. (JA 384 ¶ 17; 152 ¶ 42).

At the December 9 meeting, McDaniel acknowledged that James' comments about lack of input, one-way "conversations" and researchers being excluded from any meaningful role were correct and that she and Solomon would change things. (JA 385 ¶ 17). McDaniel acknowledged that James thought she was "not being treated well." (JA 178).

McDaniel also that James would continue working at Newsweek, stating, "*[i]f in the future* you can't engage in those conversations, you will be terminated." (JA 174) (emphasis supplied). McDaniel added, "we're going to have the meetings. . . . It's an effort to give you the opportunity to learn from the mistakes you've made in the past and the mistakes you'll possibly make in the future." (JA 178-79). In ending the meeting, McDaniel stated, "I really don't have anything left to say. My feeling is that this has not been a constructive conversation about your work. *I have scheduled, as you can see, at the bottom of the review, another session for 4 p.m. on January 25.*" (JA 385 ¶ 17; JA 178) (emphasis supplied).

The next day, December 10, James approached Solomon and said her performance evaluation was unfair and she would

seek justice. (JA 385-86 ¶ 18). Solomon reported this conversation to McDaniel. (JA 194 ¶ 3; JA 153 ¶ 44). McDaniel knew that James had complained about her performance review and promised to seek "justice." McDaniel attested that Solomon reported that James had made derogatory statements and threatened McDaniel. (JA 153 ¶ 44; JA 79-80 ¶ 22; 194 ¶ 3). James flatly denied threatening anyone. (JA 386 ¶ 18).

After James spoke with Solomon, McDaniel decided to fire James "based on Ms. James' conduct on December 9 and 10, combined with her long-term inadequate job performance and her refusal to engage in constructive discussions about her work and to accept and address criticisms." (JA 80; JA 88). James denied engaging in any disruptive behavior on December 9 or 10. (JA 384-86).

D. *Third EEOC Complaint*

On February 9, 1995, James amended Charge I and filed it with the EEOC and SDHR alleging she was fired on December 10, 1994 in retaliation for filing Charges I and II and on account of her race and age. (JA 327).

E. *Prior proceedings*

Asserting that respondent violated her rights under Title VII of the Civil Rights Act of 1964, petitioner filed suit in the United States District Court, Southern District of New York, asserting, *inter alia*, that Newsweek had unlawfully retaliated against her for protesting discriminatory activity.

At the close of discovery, Newsweek moved for summary judgment. By decision dated October 4, 1999, the district court (Hon. Loretta A. Preska) granted that motion in its entirety. (App. A-5).

Dismissing James' retaliation claim, the district court noted that James was fired on December 10, 1994, "a year and a half after the first EEOC charge and nine months after filing her second charge. Because the adverse employment action occurred so long after the protected activity, that indirect evidence does not support an inference of a causal connection. No other evidence has been presented to support this claim." (App. A-41).

Petitioner appealed Judge Preska's ruling on the retaliation claim. In a summary order, the Second Circuit affirmed, stating, James "points to her testimony that the day before she was fired, she told a supervisor that she did not believe 'her evaluation was fair' and that she was 'going to seek justice.' James contends that these comments constituted protected activity within the meaning of Title VII because they indicated her intention or willingness to seek legal redress for alleged discrimination." (App. A-3).

After summarizing the elements of a *prima facie* case of retaliation and noting that "[a]n informal complaint to a supervisor can constitute a protected activity under Title VII," the court held, "James's veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination. It cannot be expected that employees will be content with negative employment reviews, consider them just, and take them lying down. Here, James did not say — directly or indirectly — that she was being unfairly treated on account of her race, color, religion, sex, national origin or age. '[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII.'" (App. A-3–A-4) (citing *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998)).

REASONS FOR GRANTING THE WRIT

Title VII prohibits retaliation against employees who oppose discrimination in good faith. The context of the employee's opposition is crucial in determining whether she engaged in protected activity. In holding that James' "veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination" (App. A-3), the Second Circuit misinterpreted Title VII and overlooked inter-Circuit and Supreme Court authority requiring a full examination of the context of an employee's statements in determining whether she engaged in protected activity.

When management met with James on December 9, 1994 to discuss her job performance, she had already filed two EEOC charges. The next day, James told a superior that her performance review was unfair and she would seek justice. Although, on the previous day, her superiors had contemplated James' retention, they fired her after she vowed to seek justice, a plain reference to the EEO process. Had the Second Circuit followed inter-Circuit and Supreme Court authority governing the proper interpretation of employee comments, it would have held she engaged in protected speech and remanded for a trial on the merits. Certiorari is warranted.

THE COURT BELOW IGNORED INTER-CIRCUIT AND SUPREME COURT AUTHORITY REQUIRING THE COURT TO CONSIDER THE CONTEXT OF AN EMPLOYEE'S STATEMENTS IN DETERMINING WHETHER SHE ENGAGED IN PROTECTED ACTIVITY IN A RETALIATION CASE

It is settled that Title VII's anti-retaliation provision is not limited to formal discrimination complaints; it also protects employees who assert they are seeking "justice" in the wake

of two EEOC complaints. "The phrase 'opposed any practice' encompasses an individual's complaints to supervisors regardless of whether she files an EEOC charge." *Lambert v. Genesee Hospital*, 10 F.3d 46, 55 (2d Cir. 1993). *See also*, *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990) (protected activity under Title VII includes, *inter alia*, "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges").

This Court has never resolved the issue presented here: what constitutes protected activity to invoke the Title VII's "opposition" clause? However, inter-circuit authority requires courts to consider the context of an employee's opposition in determining whether she engaged in protected activity. For example, in *Booker v. Brown and Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989), citing cases from the First, Fifth, Seventh and Ninth Circuits, the Sixth Circuit counseled that courts should balance the employee's right to protest discriminatory activity with the employer's entitlement to an efficient workplace:

> Courts are required to balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel. . . . The requirements of the job and the tolerable limits of conduct in a particular setting must be explored. There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not

> covered. . . . An employee is not protected when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals.

Id. at 1312 (*citing Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); *Rosser v. Laborers' Intern. Union*, 616 F.2d 221, 223 (5th Cir. 1980); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) and *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985)).

Consistent with the above cases, in *E.E.O.C. v. Crown Zellerbach Corporation*, 720 F.2d 1008 (9th Cir. 1983), sustaining a Title VII retaliation claim, the Ninth Circuit examined expressive activity in its proper context. In that case, the defendant's employees wrote Zellerbach's client, a school district, that "racism and discrimination were prevalent at the Zellerbach Paper Company." As the Ninth Circuit noted, the letter "does not fit the classic mold of protected opposition to an unlawful employment practice" since it "did not protest any specific instant or instances of unlawful discrimination" and it "was primarily worded as a protest against the presentation of [an award to] a Zellerbach employee, and only secondarily as an objection to Zellerbach's policies themselves." Also, "the letter was directed to an outside party rather than to a Zellerbach decisionmaker or government official entrusted with responsibility for enforcing the equal opportunity laws." *Id.* at 1012.

Although the Ninth Circuit noted that "a simple assertion that an employer is personally bigoted, without more, is not statutorily protected opposition to an 'unlawful employment practice[,]' [i]n this case *the assertedly unlawful employment practices protested by the appellants could be discerned from the context of the letter*. The letter specifically mentioned the

history of unlawful employment practice charges filed against Zellerbach by black employees pursuant to Title VII. It stressed that Zellerbach had engaged in a continuing series of unlawful discriminatory employment practices, and that, if school district officials had consulted the entire record, they would have discovered the persistent complaints about these practices." *Id.* at 1013 (emphasis supplied).

Likewise, in *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), the Fifth Circuit affirmed the district court's holding that the plaintiff had engaged in protected activity by protesting his employer's failure to afford blacks adequate employment opportunities.

Like *Crown Zellerbach Corporation*, the *Payne* court examined the plaintiff's protest activity in context. In *Payne*, the employer "conten[ded] that the boycott and picketing were conducted to publicize the issues of integration of public facilities and common courtesy to blacks." However, "[a]lthough the Improvement Organization was, in part, occasioned by the position of blacks in Winnsboro in general, and although the boycott and picketing may have been to some extent a protest of this position, the district court's conclusion that the boycott and picketing activity was in opposition to unlawful employment practices of McLemore's is supported by substantial evidence." *Id.* at 1137 n.7.

Importantly, in comparable First Amendment retaliation cases, Supreme Court authority requires courts to consider the context of an employee's speech. In *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), this Court stated, "[w]hether an employer's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."

This Court applied *Connick* in *Rankin v. McPherson*, 483 U.S. 378 (1987) and *Waters v. Churchill*, 511 U.S. 661 (1994).

In *Rankin*, upon hearing that President Reagan had been shot, the plaintiff said to a colleague, "if they go for him again, I hope they get him." 483 U.S. at 381. Holding that the plaintiff had engaged in protected speech, this Court reasoned, "[c]onsidering the statement in context, as *Connick* requires, disclosed that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U.S.C. § 871(a) or 18 U.S.C. § 2385, or, indeed, that could properly be criminalized at all." *Id.* at 387.

Accordingly, while, on its face, McPherson's comment had little social value, in context, the plaintiff had engaged in protected speech by addressing matters of public concern.

In *Waters*, this Court further emphasized the importance of considering the public employee's speech in context. This Court stressed that, in resolving whether a public employee could be disciplined for speaking out, the court should consider whether the employer reasonably understood what the plaintiff had actually said. In other words, the context of the plaintiff's speech is crucial.

> If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and

> procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision — discharge, suspension, reprimand, or whatever else — of the sort involved in the particular case. . . . Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable. 511 U.S. at 677-78.

Here, the Second Circuit ignored the context in which James vowed to seek justice, ignoring inter-circuit and Supreme Court authority requiring courts to review an employee's comments in their totality. *See also*, *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) ("it has been long established that Title VII, as remedial legislation, is construed broadly. This directive applies to the reasonableness of a plaintiff's belief that a violation occurred, as well as to other matters"); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-50 (1986) (elementary summary judgment principles require courts to view the record in the light most favorable to the non-moving party and to draw all reasonable inferences in her favor).

Only a few months before James was fired, McDaniel said James could not represent Newsweek at a conference of black journalists because she had complained about the company and had a bad attitude. (JA 381 ¶ 13(d); JA 361 ¶ 89). This comment was a not-too-subtle reference to James' two pending EEOC complaints protesting what she reasonably believed were discriminatory promotion denials. Indeed, at the December 9, 1994 meeting, McDaniel acknowledged

that James thought Newsweek was not treating her fairly. (JA 178). These EEOC complaints place in full context James' objection to the unfair performance review and her vow to seek "justice."

Applying the correct standard, a jury may plainly conclude that management understood that, in vowing to seek "justice," James would either prosecute her EEOC complaints or file another complaint, or both, especially since her comment was a plain reference to the legal process. *See*, Webster's New World Dictionary, Third College Edition, at 734 (defining "justice" as, *inter alia*, "the use of authority and power to uphold what is right, just or lawful" and "the administration of law; procedure of a law court").

Accordingly, certiorari is warranted to resolve the inter-circuit split governing the interpretation of an employee's protests in Title VII retaliation cases and to conform the Second Circuit to the jurisprudence in comparable First Amendment cases.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: July 27, 2000
Goshen, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

SDNY
96-CV-393
Preska

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of May, two thousand.

PRESENT:

HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges.

UNITED STATES COURT
OF APPEALS
FILED MAY 2 2000
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

X——————————————————————X

AYLEEN JAMES,

Plaintiff-Appellant,

– v. –

99-9280

NEWSWEEK, INC.,

Defendant-Appellee.

X——————————————————————X

APPEARING FOR APPELLANT:

STEPHEN BERGSTEIN, Goshen, NY (Michael H. Sussman, Law Offices of Michael H. Sussman, Goshen, NY, on the brief).

APPEARING FOR APPELLEE:

JILL L. ROSENBERG, New York, NY (Orrick, Herrington & Sutcliffe LLP, New York, NY, on the brief).

Appeal from the United States District Court for the Southern District of New York (Preska, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be **AFFIRMED.**

Ayleen James appeals a judgment of the United States District Court for the Southern District of New York, granting summary judgment in favor of Newsweek, Inc. on her complaint. James alleged a variety of discrimination theories, including race, color, age, sex, national origin, disability and retaliation. On appeal, James only challenges the dismissal of her Title VII claim alleging retaliatory discharge. We affirm.

As to James's retaliatory discharge claim, the district court concluded:

> [James's] discharge was on December 10, 1994, a year and a half after filing her first administrative charge and nine months after filing her second charge. Because the adverse employment action occurred so long after the protected activity, that indirect evidence does not support an inference of a causal connection. *No other evidence has been presented to support this claim.* Accordingly, plaintiff

> has failed to present a question of fact for a jury to consider which would preclude summary judgment.

James v. Newsweek, 1999 WL 796173, at *20 (S.D.N.Y. Sept. 30, 1999) (citations omitted and emphasis added).

James now argues that she did present "other evidence" in support of her claim. Specifically, she points to her testimony that the day before she was fired, she told a supervisor that she did not believe "her evaluation was fair" and that she was "going to seek justice". James contends that these comments constituted protected activity within the meaning of Title VII because they indicated her intention or willingness to seek legal redress for alleged discrimination.

In order to establish a *prima facie* case of retaliation, a plaintiff must demonstrate that: (1) she was engaged in a protected activity; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) the employer took adverse action against the plaintiff; and (4) a causal connection existed between the plaintiff's protected activity and the adverse action taken by the employer. *See Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993).

An informal complaint to a supervisor can constitute a protected activity under Title VII. *See Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992). James's veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination. It cannot be expected that employees will be content with negative employment reviews, consider them just, and take them lying down. Here, James did not say — directly or indirectly — that she was being unfairly treated on account of her race, color, religion, sex, national origin or age. "[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's

opposition was directed at conduct prohibited by Title VII." *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998).

For the reasons set forth above, the judgment is hereby **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

/s/ Lucille Carr

Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AYLEEN JAMES,	X	
Plaintiff,	:	**MEMORANDUM and ORDER**
– against –	:	96 Civ. 0393 (LAP)
NEWSWEEK,	:	
Defendant.	:	
	X	

LORETTA A. PRESKA, United States District Judge

Plaintiff Ayleen James ("plaintiff" or "James") brings this action for discrimination[1] under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 621 *et seq.* ("Title VII"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA") and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 *et seq.* ("ADA") against defendant, Newsweek ("defendant" or "Newsweek"), alleging seven different theories of discrimination including race, color, age, sex, national origin, disability and retaliation. Newsweek now moves for summary judgment. Because plaintiff has not proffered any evidence from which a jury could find a basis of discrimination or retaliation on any of the above grounds, defendant's motion is granted.[2]

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[1] Plaintiff James initiated this action *pro se* but submits her opposition to defendant's summary judgment motion through her counsel, Michael H. Sussman, Esq.

[2] In deciding this motion I have considered the following submissions: Defendant's Statement of Undisputed Material Facts ("Def. 56.1 St."); Plaintiff's Response to Defendant's 56.1 Statement ("Pl. 56.1

BACKGROUND

For purposes of this motion, except where otherwise stated, the following facts are undisputed. Defendant Newsweek is the publisher of the weekly news magazine *Newsweek* (the "Magazine"). (Barish Decl. ¶ 2). Newsweek is divided into a "business side" and an "editorial side." At the times relevant to this action, the editorial side was divided into seven departments representing the Nation, Foreign, Business, Lifestyles, Society and Arts sections of the Magazine, as well as one department for the overseas editions. (*Id.* ¶ 2). Each section was made up of editors, writers and researchers. (*Id.*). Plaintiff James, a black woman of partially Panamanian ancestry, was over 40 years old at the time of the filing of her first administrative charge. In 1972, she was hired by Newsweek as a Researcher (Editorial Assistant) for the Magazine. On January 1, 1980, plaintiff was promoted to Writer/Researcher (Senior Editorial Assistant) in the Foreign section of the Magazine and remained in that position until December 10, 1994, when she was discharged. (*Id.* ¶ 3).

Although plaintiff claims she never received a clear explanation of what her job duties were, defendant asserts that a Senior Editorial Assistant in the Research Department is

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St."); Declarations submitted on behalf of the following individuals attached to Defendant's Notice of Motion: Ann McDaniel ("McDaniel Decl."); Jean Barish ("Barish Decl."); Ted Slate ("Slate Decl."); Sarah Crichton ("Crichton Decl."); Steven Shabad ("Shabad Decl."); Jolie Solomon ("Solomon Decl."); and Jill L. Rosenberg ("Rose. Decl."); Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def. Mem."); Plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment ("Pl. Aff."); Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Pl. Opp. Mem."); Reply Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def. Reply Mem."); Supplemental Declarations of Jean Barish ("Barish Supp. Decl."); Ted Slate ("Slate Supp. Decl."); Ann McDaniel ("McDaniel Supp. Decl."); and Jill L. Rosenberg ("Rose. Supp. Decl.").

responsible for (1) researching and fact-checking articles in his or her assigned section; (2) assisting with research and fact-checking requested by another section of the Magazine; and (3) suggesting story ideas and reporting stories deemed appropriate. (Slate Decl. ¶ 3). Plaintiff has not disputed this description.

A. *Associate Editor/Lifestyles Section*

On September 3, 1992, plaintiff applied for the position of Associate Editor of the Lifestyles section. (Pl. Depo.[3] at 54-59; Crichton Decl., Ex. 2). This position involved reporting, writing and editing for "Newsmakers," a weekly feature of the Magazine that focused on interesting and newsworthy people and trends in popular culture. (Crichton Decl., Ex. 1). In addition to plaintiff, four other candidates (all Caucasian) applied for this position. (Barish Decl. ¶ 5).

Mary Talbot ("Talbot"), an Editorial Assistant in the Foreign section, was recommended for the position by Sarah Crichton ("Crichton"), one of Newsweek's Assistant Managing Editors responsible for interviewing the candidates. (Barish Decl. ¶¶ 5, 6; Crichton Decl. ¶ 4). According to defendant, Talbot had pitched good story ideas to Crichton and Susan Wyland ("Wyland") (initially responsible for interviewing candidates) and had reported and written several pieces on fashion and trends for the Lifestyles section. (Crichton Decl. ¶ 10). Due to confusion over a change in the interviewer, plaintiff and two other candidates (caucasians who are younger than plaintiff, *id.* ¶ 7), were not interviewed prior to Crichton's selection of Talbot. Upon learning of this mistake, however, the application process was reopened, and Crichton immediately interviewed plaintiff and the two other candidates. (*Id.* ¶¶ 5-9; Barish Decl. ¶ 6). Because Talbot had

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[3] Citations to "Pl. Depo." refer to plaintiff's deposition attached to Rose. Decl., Ex. 2.

already begun performing the Associate Editor/Lifestyles job, and the job needed to be done, she was permitted to continue performing the work on a temporary basis while the other candidates were considered. (Barish Supp. Decl. ¶ 3). Plaintiff argues that she was qualified for this position because she was a college graduate with a Master's Degree and had accumulated twenty years of reporting experience on topics such as popular culture, current events and newsmakers. (Pl. Aff. ¶ 5). Plaintiff also claims that much of her editing and research were in areas relevant to popular culture and that she had written free lance pieces on subjects relevant to Lifestyles. (*Id.*). Crichton concluded, however, that plaintiff had little writing and reporting experience, especially in the areas of popular culture, music and trends, (Crichton Decl. ¶ 10), and gave the position to Talbot.

B. *1993 Bureau Internship*

In March 1993, plaintiff applied to Ted Slate ("Slate"), the Director of Research Services, for a summer bureau reporting internship. (Slate Decl., Ex. 2; Pl. Depo. at 112). Plaintiff asserts that she was rejected for this position based upon "anonymous comments from persons who felt I was not prepared to handle such a position." (Pl. Aff. ¶ 11). This conclusory statement is belied by Slate's conduct in evaluating each applicant, including plaintiff, by consulting with their senior editor, head researcher, and others on the writing staff who had recently worked with each applicant. (Slate Decl. ¶ 7). Nancy Cooper ("Cooper"), plaintiff's senior editor, and Steve Shabad ("Shabad"), head researcher, Foreign section, each expressed concerns about plaintiff's job performance and work habits. (Shabad Decl. ¶¶ 3-4). When asked to evaluate plaintiff's performance, Shabad told Slate that he did not believe she was qualified for the internship. Shabad described her job performance as "erratic" and stated that while sometimes her work was good, at other times it was "careless and unreliable." (*Id.*). Shabad further stated that

plaintiff was at times "unresponsive and demonstrated a lack of understanding about the issues at hand." (*Id.*). Slate also relied on his own personal knowledge of plaintiff's performance and his review of the reporting files she submitted. (Slate Decl. ¶ 9).

The final determination was made by Slate, Alexis Gelber ("Gelber"), the Assistant Managing Editor in charge of Research, and Ann McDaniel ("McDaniel"), the Chief of Correspondents. (*Id.* ¶ 7). Plaintiff claims that Gelber had no knowledge of her work and that Shabad did not review plaintiff's application. Plaintiff does not dispute, however, that she and Shabad had worked together for twenty-two years. (Pl. 56.1 St. ¶¶ 26, 29). Plaintiff further claims that Cooper's evaluation was biased because she had, in the past, made racist remarks to plaintiff. For example, when discussing her colleague, Mark Whitaker's, well-dressed style, Cooper allegedly asked plaintiff if she didn't like Whitaker because he wasn't "black enough." (Pl. Depo. at 133). When asked to recall other racial comments made by Cooper, plaintiff responded that she "can't recall all of them simply because I chose to try and block them out." (*Id.* at 137). Of the seven candidates selected for the reporting internship, five were Caucasian, one was Asian and one was Black. (Slate Decl. ¶ 10). All of the chosen candidates were under 40. (Pl. Aff. ¶ 11, Ex. 11).

On May 20, 1993, Slate informed plaintiff by memo that she was not selected for the 1993 internship but that he "welcome[d] the opportunity to discuss with [plaintiff] what skills must be developed and improved in order for [her] to become a stronger candidate for a [bureau internship]". (Slate Decl. ¶ 3). A meeting was set up for June 10, 1993 to discuss plaintiff's performance, but plaintiff requested a written analysis prior to the meeting. (Pl. Depo. at 142-43; Slate Decl., Ex. 4). After numerous scheduling attempts, plaintiff, Slate and Jean Barish ("Barish"), Vice President in charge of

Human Resources, met on June 30, 1993. (Slate Decl., Ex. 7). Plaintiff does not dispute that at the meeting they discussed an error she made in checking the spelling of the name George C. Marshall. Plaintiff stated that she did not notice that the middle initial was an "S" rather than "C" because she was not wearing her reading glasses. (*Id.*, Ex. 8; Pl. Depo. at 154-56). Plaintiff walked out of the meeting before it was concluded and chose not to reschedule, despite Slate's invitation to do so (Pl. Depo. 158-164; Slate Decl., Ex. 10, ¶ 22), because "she felt the tone of the meeting was highly antagonistic, manifesting the company's retaliatory intentions toward her." (Pl. 56.1 ¶ 41).

C. *State Department Correspondent*

On November 10, 1993, plaintiff submitted an application for the position of State Department Correspondent. (Pl. Depo. at 170-71). This position, to develop, report and write stories on the State Department and foreign affairs, was considered a senior level job in the Washington bureau requiring extensive interaction with high-level government officials, diplomats and policymakers. (McDaniel Decl. ¶ 4, Ex. 1; Pl. Depo. at 166-67). McDaniel interviewed plaintiff for the position, reviewed her application and her writing samples and determined that plaintiff was not qualified for this position. (McDaniel Decl. ¶¶ 6, 10, 11). McDaniel stated that "Ms. James had only basic reporting skills, her written work was weak and she had little sense of how to develop sources, package a story and present it." (Id. ¶ 10). Karen Breslau ("Breslau") was selected for this position instead because she (1) had served overseas in a correspondent position and developed a good working knowledge of U.S. foreign policy; (2) had performed well as a Newsweek reporter; (3) expressed creative story ideas and demonstrated she knew how to develop and report a story; (4) was strongly supported by the members of the Washington bureau; and (5) was

recommended by Evan Thomas, the Washington, D.C. Bureau Chief. (McDaniel Decl. ¶ 12, Ex. 2).

D. *Reporter/Nation and Lifestyles Sections*

An opening for the position of Reporter for the Nation and Lifestyles sections was posted on November 22, 1993. (McDaniel Decl., Ex. 3). Although plaintiff contends the job description was "purposely vague" (Pl. 56.1 ¶ 56), defendant states the responsibilities of this position included developing, reporting and writing stories on issues of interest to the Nation and Lifestyles sections of the Magazine. (McDaniel Decl., Ex. 3). Plaintiff and two other candidates (both Caucasian) applied for the position and were to be interviewed by McDaniel. (*Id.* ¶ 16, 3).

After submitting her application on December 1, 1993, plaintiff went on an extended vacation which plaintiff claims was spent with relatives from December through January 1994. (Pl. Depo. at 201-03). Newsweek contends that it attempted to contact plaintiff in order to set up an interview by leaving messages at plaintiff's home and office and on her computer at work. (McDaniel Decl. ¶ 18). Plaintiff claims that she did not receive any messages at home and retrieved email messages at work only after she returned to work in January 1994 because she could not do so from home. (Pl. 56.1 St. ¶ 61). When no response was received, McDaniel, already familiar with plaintiff's qualifications because of her interview for the State Department position only a few weeks earlier, recommended Patrick Rogers ("Rogers") for the job, despite his fewer years of experience. McDaniel had personal knowledge of his extraordinary researching and writing skills, and he was enthusiastically supported by Newsweek Editors and Senior Editors. (McDaniel Decl. ¶¶ 18, 19, Ex. 4). Plaintiff contends that she was not given an opportunity to write for and report directly to McDaniel and that her twenty-plus

years of experience at Newsweek far surpassed Rogers' more limited experience. (Pl. 56.1 ¶ 64, 65).

E. *Other Positions*

In the summer of 1994, plaintiff applied for three additional positions. (Barish Decl. ¶ 8).

1. *Researcher/Washington, D.C. Bureau*

This position required extensive research experience, in-depth knowledge of the Washington political scene and some reporting experience. (*Id.*, Ex. 1). On August 25, 1994, plaintiff met with McDaniel and Barish to interview for this position, although plaintiff contests that this meeting constituted an interview. (McDaniel Decl. ¶ 30; Pl. 56.1 St. ¶ 68). At the time of this meeting, plaintiff had been on probation for approximately one month. (*Id.* ¶ 31). Lucy Shackelford, an external candidate, was recommended for the position. She had been Bob Woodward's researcher at the Washington Post. (*Id.*).

2. *Writer/Lifestyle Trends*

The responsibilities of this position included creating and reporting story ideas, writing insightful articles on lifestyle trends, and extensive on-the-street reporting. (Barish Decl., Ex. 1). Plaintiff met with Lisa Welsh ("Welsh") from Human Resources and John Capouya ("Capouya"), a Senior Editor for the Lifestyles section, although plaintiff denies this meeting was an interview. (*Id.* ¶ 8; Pl. 56.1 St. ¶ 72). Welsh and Capouya concluded that plaintiff was not qualified and, instead, hired Michel Marriott, a black male over forty. (*Id.*; Rose. Decl., Exs. 13, 14).

3. *Society/Education Writer*

This position involved suggesting and creating story ideas on education and related topics as well as writing and reporting stories on education. Requirements included extensive reporting and writing experience for a newspaper or magazine covering education policy, school politics, child development and child psychology. (Barish Decl., Ex. 1). Plaintiff was interviewed by Welsh and Aric Press, the Senior Editor for the Society section. (*Id.* ¶ 8). LynNell Hancock ("Hancock"), an external candidate over forty years old, was chosen for the position. (Rose. Decl., Exs. 15, 16).

F. *Events Leading to Plaintiff's Discharge*

It is undisputed that Newsweek initiated formal performance reviews. (Barish Decl. ¶ 9). In February 1994, plaintiff received a written performance review for 1993 along with a memo from Slate explaining her evaluation and inviting plaintiff to meet with him if she wished to discuss it. (Slate Decl., Ex. 12; Pl. Depo. at 242-43). Although plaintiff claims that Slate's overall view was that her performance was "mostly adequate" (Pl. Aff. ¶ 9), the written review explains in great detail that her work performance over the past year had been erratic, her approach to her research duties was mechanical and superficial, and that writers and editors indicated a lack of confidence in her research and reporting. (Slate Decl., Ex. 12). Plaintiff contends that the review provided no documentation as to any "lack of confidence" and did not mention her accomplishments such as three published by-lines which she achieved in 1993 and the e-mail messages plaintiff received from editors and reporters complimenting her performance. (Pl. Aff., Ex. 8D). Plaintiff's review also advised her that in the coming year she was expected to engage herself in her work, subject her copy to her own scrutiny without relying on editors or correspondents as her primary source of information for fact-checking, and meet

with her head researcher and/or Slate to discuss her work and resolve the issues under discussion. (Slate Decl., Ex. 12). Plaintiff never made any effort to meet with Slate to discuss her evaluation. (*Id.*; Pl. Depo. at 251).

On June 1, 1994, plaintiff met with McDaniel, now responsible for overseeing the research staff after Slate's retirement, to discuss the internship plaintiff applied for in 1994. (McDaniel Decl. ¶ 21; Pl. Aff. ¶ 13(d)). Plaintiff claims the purpose of the meeting was to also discuss Newsweek's refusal to sponsor her at the National Association of Black Journalists conference ("NABJ"). (Pl. Aff. ¶ 13(d)). Plaintiff claims McDaniel informed her that she did not find plaintiff to be a good ambassador for the company because she had numerous complaints about the company and because her job performance was poor. (*Id.*). The meeting was concededly contentious and, McDaniel asserts, plaintiff began speaking in Spanish and left before the meeting was over. Plaintiff asserts that she did not leave before the meeting was over but that McDaniel said "the door was open" indicating that plaintiff was to leave. (McDaniel Decl. ¶ 22; Pl. Aff. ¶ 13(d); Pl. Depo. at 264-65).

Plaintiff attended another meeting on July 21, 1994, with McDaniel, Barish and Silvio Marinozzi ("Marinozzi"), plaintiff's union representative, where she was told her work was unsatisfactory and she was being placed on probation. (McDaniel Decl. ¶¶ 23-25; Pl. Depo. at 278-79). Following this meeting, McDaniel sent plaintiff two memos detailing the reasons for placing her on probation. The first memo cautioned plaintiff that her performance had been "unsatisfactory" and "unless there is substantial and sustained improvement" plaintiff was in "serious danger of being discharged." (McDaniel Decl., Ex. 5). The second memo further detailed plaintiff's unsatisfactory performance but also offered assistance to help plaintiff succeed. (*Id.*, Ex. 6). Plaintiff was

further advised that she was to have monthly meetings with McDaniel and Barish to review her performance. (*Id.*, Ex. 5).

Their first meeting was September 7, 1994. (McDaniel Decl. ¶ 25, Ex. 5). Plaintiff attended the meeting but asked that it be postponed until her union representative, Marinozzi, could attend. Pursuant to her request, the meeting was postponed to September 28. (McDaniel Decl. ¶ 32; Pl. Depo. at 323-24). Following the September 7 meeting, plaintiff informed Shabad that "she anticipated she was about to be fired by Newsweek and would not be in for two days due to stress arising from that." (Pl. 56.1 ¶ 98). One day before the September 28 meeting, Barish received a memo from plaintiff requesting that Dona Fowler ("Fowler"), another union representative, be present at the meeting. (Barish Decl., Ex. 2). Fowler could not attend on one day's notice, thus the meeting was postponed to October 13, 1994. (McDaniel Decl. ¶ 33, Ex. 10).

Midday on September 28, 1994, plaintiff told Shabad she was leaving and would be back in one week because she was not feeling well. (Shabad Decl. ¶ 9; Pl. Depo. at 332-35). Barish called plaintiff that night to inform her that this behavior was unacceptable, and the next day they met in Barish's office along with McDaniel and Marinozzi. (Barish Decl. ¶ 17, Ex. 3). At that time, plaintiff informed Barish that she was applying for short-term disability. (*Id.*; Pl. Aff. ¶ 14). Ultimately, plaintiff's claim for disability benefits was denied by Newsweek's insurance carrier, Prudential (Barish Decl., Ex. 4; Pl. Aff. ¶ 15), and she returned to work on December 7, 1994. (Barish Decl. ¶ 20). On December 9, 1994, McDaniel set up a meeting to discuss plaintiff's 1994 performance review. Present at that meeting were plaintiff, Marinozzi, McDaniel and Jolie Solomon ("Solomon"), the Deputy Chief of Correspondents. (McDaniel Decl. ¶¶ 36, 37). McDaniel claims that plaintiff paced the floor despite requests that she sit down, repeatedly interrupted her, and swung a large

microphone over McDaniel's head and thrust it in her face in a threatening manner.[4] (*Id.* ¶ 41). Plaintiff denies McDaniel's statements about plaintiff's conduct toward McDaniel but does not deny that she left the meeting with a slam of the door. (Pl. Aff. ¶ 17).

There is no dispute that the next day plaintiff approached Solomon to discuss the previous day's meeting. Solomon asserts that plaintiff told her she was going to "trash" McDaniel. (Solomon Decl. ¶ 3). Plaintiff denies she said this and states, instead, that she told Solomon that "[t]here are two sides to every story; you know nothing about me. Remember that, nothing about me, nothing." (Pl. 56.1 St. ¶ 116). Subsequently, Solomon reported this encounter to McDaniel, and a decision to terminate plaintiff was made. (Solomon Decl. ¶ 3; Barish Decl. ¶ 22).

On December 10, 1994, McDaniel informed plaintiff that she was being terminated and followed up this conversation with a letter stating the reasons for her dismissal. (Pl. Depo. at 383-84; Barish Decl., Ex. 5). Plaintiff's union subsequently filed a grievance concerning her discharge in accordance with the collective bargaining agreement, but, after receiving documentation from Newsweek concerning the reasons for plaintiff's discharge, the union did not pursue the grievance. (Barish Decl. ¶ 24).

G. *Jurisdictional Matters*

On or about July 27, 1993, plaintiff filed a charge of discrimination ("Charge I") with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights ("NYSDHR") alleging that she was denied a

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[4] Plaintiff requested that she be allowed to tape record the meeting, and Newsweek granted her request. (McDaniel Decl. ¶ 37; Pl. Depo. at 357).

promotion on November 10, 1992 to the position of Associate Editor/Lifestyles section and denied a bureau internship in May 1993. (Rose. Decl., Exs. 3, 4). Plaintiff's Charge I allegations were based on race, ethnicity and age. (*Id.*, Ex. 3)

On or about March 29, 1994, plaintiff filed a charge of discrimination ("Charge II") with the EEOC alleging that she was denied promotion to the positions of State Department Correspondent and Reporter for the Nation and Lifestyles sections in retaliation for filing Charge I. (*Id.*, Ex. 5).

On or about February 9, 1995, plaintiff amended Charge I ("Amended Charge I") and filed it with the EEOC and NYSDHR alleging that she was terminated on December 10, 1994 in retaliation for her filing Charges I and II and on account of her race and age. (*Id.*, Ex. 6). It is undisputed that plaintiff did not allege discrimination on account of gender or disability in either Charge I, Charge II or Amended Charge I. (*Id.*, Exs. 3, 5, 6). On August 29, 1995, the NYSDHR issued a finding of "No Probable Cause" as to Charge I and Amended Charge I, and plaintiff received a Right to Sue Letter on or about October 25, 1995. (*Id.*, Exs. 7, 8, 9). Charge II was also dismissed, and the EEOC issued plaintiff a Right to Sue Letter on July 25, 1996. (*Id.*, Exs. 8, 9). Plaintiff commenced the present action in January 1996.

DISCUSSION

I. *Summary Judgment Standard*

Under Fed. R. Civ. P. 56(c), "[a] motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2d Cir. 1994); *see* Fed. R. Civ. P. 56(c). *See generally Celotex Corp. v. Catrett*, 477

U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the particular litigation if the substantive law at issue so renders them. *Anderson*, 477 U.S. at 248.

The burden of establishing that no genuine factual dispute exists rests on the party seeking summary judgment. *Chambers*, 43 F.3d at 36. "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial," to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995); *accord Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("[T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The moving party, in other words, does not bear the burden of disproving an essential element of the nonmoving party's claim.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *accord Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, the nonmovant must "'come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise.'" *Trans Sport v. Starter Sportswear*, 964 F.2d 186, 188 (2d Cir. 1992) (citation omitted).

In assessing materials such as affidavits, exhibits, interrogatory answers, and depositions to determine whether the moving party has satisfied its burden, the court must view the record "in the light most favorable to the party opposing the motion" by resolving "all ambiguities and draw[ing] all factual inferences in favor of the party against whom summary judgment is sought." *Chambers*, 43 F.3d at 36. "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a *reasonable* inference could be drawn in favor of the non-moving party, summary judgment is improper." *Id.* at 37 (emphasis added).

Further, because plaintiff James filed this action *pro se*, I must judge her pleadings by a more lenient standard than that accorded to "formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972); *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988) (referring to the "special solicitude" afforded *pro se* litigants when confronted with motions for summary judgment). Proceeding *pro se*, however, does not relieve a plaintiff of the usual requirements of summary judgment, especially in this case where plaintiff James is represented by counsel in her opposition to this motion. *See Lee v. Coughlin*, 902 F. Supp. 424, 429 (S.D.N.Y. 1995).

II. *Subject Matter Jurisdiction*

A plaintiff asserting a Title VII claim must satisfy an exhaustion requirement. "A district court only has jurisdiction to hear Title VII claims that either are included in an EEOC charge or are based on conduct subsequent to the EEOC charge which is 'reasonably related' to that alleged in the EEOC charge." *Butts v. City of New York Dept. of Housing, Preservation and Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993) (quoting *Stewart v. United States Immigration & Nat. Serv.*, 762 F.2d 193, 198 (2d Cir.1985)). The same rule applies to

claims brought in court under the ADEA, *see Miller v. ITT Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985), and the ADA, *see Garcia v. Coca-Cola Bottling Co.*, 1998 WL 151032 at *2 (S.D.N.Y. March 12, 1998). The reason for this "essential element of Title VII's statutory scheme" is to "encourage settlement of discrimination disputes through conciliation and voluntary compliance." *Butts*, 990 F.2d at 1401 (internal quotation marks and citations omitted).

In *Butts*, the Court of Appeals discussed three instances in which a plaintiff can bring a claim in a civil action when that same claim was not raised in an EEOC charge:

> (1) the conduct complained of falls within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination; (2) the civil complaint alleges retaliation by the employer for filing the EEOC charge; or (3) the civil complainant alleges further incidents of discrimination carried out in precisely the manner alleged in the EEOC charge.

Shah v. New York State Dep't of Civil Service, No. 94 Civ. 9193 (RPP), 1997 WL 769565, at *6 (S.D.N.Y. Dec. 10, 1997) (discussing and citing *Butts*, 990 F.2d at 1402-03), *affirmed in part and vacated in part*, 168 F.3d 610 (2d Cir. 1999). Here, plaintiff adds two new discrimination theories (gender and disability) and new acts of discrimination that were not raised in the administrative charges.

A. *New Theories of Discrimination — Gender and Disability*

In her First Amended Complaint, plaintiff asserts claims under the ADA for disability-based discrimination and under Title VII for gender-based discrimination. Plaintiff did not allege gender or disability as a basis for a claim of discrimination in any of the three administrative charges filed with

the EEOC. *See, e.g., Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998) (federal courts generally have no jurisdiction to hear claims not alleged in an employee's EEOC charge). Thus, I only have jurisdiction over plaintiff's federal claims of gender and disability discrimination if they are "reasonably related" to a timely filed EEOC charge. *Clements v. St. Vincent's Hosp.*, 919 F. Supp. 161, 163 (S.D.N.Y. 1996) (citing *Butts*, 990 F.2d at 1402).

Here, plaintiff's new theories of discrimination do not fall into any of the three "reasonably related" categories under *Butts*. *Butts* essentially allows for "loose pleading" by "[r]ecognizing that EEOC charges frequently are filled out by employees without the benefit of counsel. . . ." *Butts*, 990 F.2d at 1402 (quoting *Smith*, 571 F.2d at 107 n. 10). In this case, however, plaintiff was represented by counsel when she filed her Amended Charge I in January 1995. (Rose. Decl., Ex. 1). There was absolutely no reference to any gender-based or disability-based discrimination in the charges filed with the administrative agencies, and any investigation could not have been expected to evolve into an investigation into one of these new theories. *See, e.g., Porter v. Texaco, Inc.*, 985 F. Supp. 380, 383 (S.D.N.Y. 1997) (allegations for sexual discrimination were not reasonably related to the age discrimination or retaliation allegations in original EEOC charge); *Clements*, 919 F. Supp. at 163 (sex discrimination claim asserted for first time in court not within scope of EEOC charge asserting race discrimination). Accordingly, plaintiff's gender and disability claims are dismissed for lack of subject matter jurisdiction because plaintiff has not exhausted her administrative remedies as to those claims.

B. *New Acts of Discrimination*

Plaintiff asserts new factual allegations, not mentioned in any of her administrative charges, specifically that (1) a February 1994 evaluation did not reflect her job performance, (2)

she was unfairly placed on probation in July 1994, and (3) also in 1994, she was denied three promotions. Plaintiff was clearly aware of the February 1994 evaluation before she filed Charge II on March 29, 1994, and she was aware of all three factual allegations before filing Amended Charge I on February 9, 1995. It remains unclear whether the exceptions discussed in *Butts* apply only to conduct which arises after the filing of an EEOC charge, or whether the conduct can arise prior to the filing of an EEOC charge. *See McNight v. Dormitory Auth. of N.Y.*, No. 97 Civ. 394, 1998 WL 70328, at *7 n. 3 (S.D.N.Y. Feb. 19, 1998). Language in *Butts* and other cases suggests, without explicitly deciding, that the conduct must arise subsequent to the filing of the EEOC charge. *See id.* Nonetheless, *Butts* addressed conduct which arose prior to such a filing in making a reasonably related determination. *See id.*; *see also Curtis v. Airborne Freight Corporation*, 98 Civ. 4062 (SAS), 1998 WL 883297, at *6 n. 6 (S.D.N.Y. Dec. 17, 1998) (reading *Butts* as permitting consideration of reasonably related conduct arising prior to filing of EEOC charges); *Shah*, 1997 WL 769565, at *6-*7 (applying this liberal pleading rule to the exhaustion requirement and the "reasonably related" standard articulated in *Butts*). For purposes of the present motion, I shall assume, without deciding, that activity which arises prior to the filing of an EEOC charge can nonetheless be deemed exhausted when it is not included in an EEOC charge.

Accordingly, construing the pleadings liberally, I find that the allegations plaintiff raises are "reasonably related" to those filed administratively, were exhausted, and over which I, therefore, have subject matter jurisdiction.

III. *Summary Judgment Standard for Employment Cases*

Under the ADEA, employers may not discharge an employee by reason of his or her age if that employee is between the ages of 40 and 70. 29 U.S.C. § 623(a)(1), 631(a); *Woroski*

v. Nashua Corp, 31 F.3d 105, 108 (2d Cir. 1994). The same analysis is applicable to Title VII claims. *Id.* at 108; *Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997) (citations omitted).

It often is difficult to apply summary judgment analysis in employment discrimination cases because they necessarily turn on the intent of the alleged discriminator, and plaintiffs will rarely uncover direct evidence of discriminatory intent. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464-65 (2d Cir. 1989). Nonetheless, a plaintiff must produce some evidence from which a reasonable inference of discrimination can be drawn. *McLee v. Chrysler Corp.*, 109 F.3d 130, 134-35 (2d Cir. 1997). For a discrimination plaintiff to survive a motion for summary judgment he must do more than present "'conclusory allegations of discrimination;'" *Duprey v. Prudential Insur. Co. of America*, 910 F. Supp. 879, 883 (N.D.N.Y. 1996) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985)); "he must offer 'concrete particulars' to substantiate [his] claim." *Id.*

To address these concerns, in discrimination cases courts apply the three-part test, announced in *McDonnell Douglas Corp. v. Green*, 412 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny, as they apply in other statutory discrimination cases. Under this standard, a plaintiff bears the initial burden, albeit minimal, of establishing a *prima facie* case of discrimination. *See Fisher v. Vassar College*, 114 F.3d 1332, 1340 & n. 7 (2d Cir. 1997) (in banc) (collecting cases), *cert. denied*, 118 S. Ct. 851 (1998); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 383 (2d Cir. 1996).

If plaintiff establishes his or her *prima facie* case, the burden of production shifts to the defendant to produce "an explanation to rebut the *prima facie* case — *i.e.*, the burden of producing evidence that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'"

Fisher, 114 F.3d at 1335 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 2747 (quoting *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1093)). As the Court of Appeals noted in *Fisher*, "[a]ny legitimate, nondiscriminatory reason will rebut the presumption triggered by the *prima facie* case." 114 F.3d at 1336. Accordingly, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons in order to nullify the presumption and obligate the plaintiff to satisfy the burden of proof." *Id.* (quoting *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094).

Once a defendant has met its burden, "the presumption that triggered the defendant's burden of production . . . 'drop[s] out of the picture'" *Id.* (quoting *Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (2d Cir. 1994) (quoting *St. Mary's*, 509 U.S. at 509, 113 S. Ct. at 2748)). The "factual inquiry proceeds to a new level of specificity," *St. Mary's*, 509 U.S. at 516, 113 S. Ct. at 2752; *Fisher*, 114 F.3d at 1336, and the burden shifts back to plaintiff to put forth adequate evidence to support a rational finding that the "legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's [age, race or national origin] was the reason for [the adverse decision.]" *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2d Cir. 1996), *cert. denied*, -- U.S. --, 117 S. Ct. 1819, 137 L.Ed.2d 1027 (1997). Plaintiff need not show that this was the only factor in the employer's decision. *See Charrette*, 806 F. Supp. 1045, 1060 (N.D.N.Y. 1992) (citing *Montana v. First Federal*, 869 F.2d 100, 105 (2d Cir. 1989) (citations omitted)). Nor must plaintiffs demonstrate that defendant's "'proffered reason is false, but only that its stated reason was not the only reason and that [age, race or national origin] did make a difference.'" *See Charrette*, 806 F. Supp at 1060 (quoting *Montana*, 869 F.2d at 105 (citation omitted)). If, however, in the last analysis, plaintiffs are "'unable to show evidence from which a jury could infer

discrimination . . ., then summary judgment may be granted.'" *See Charrette*, 806 F. Supp. at 1061 (quoting *Diamantopulos v. Brookside Corp.*, 685 F. Supp. 322, 328 (D. Conn. 1988) (citations omitted)). In all cases, the plaintiff always "retains that ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." *Fisher*, 114 F.3d at 1336 (quoting *St. Mary's*, 509 U.S. at 508, 113 S. Ct. at 2747-48 (quoting *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095 (alteration in *St. Mary's*))).

Merely showing that the employer's proffered reason is pretextual — that the stated reason is not the real reason — will not necessarily carry the plaintiff's ultimate burden of persuasion. Rather, the plaintiff must also demonstrate that the true reason was an illegally discriminatory one. *Fisher*, 114 F.3d at 1338; *see St. Mary's*, 509 U.S. at 515, 113 S. Ct. at 2752 ("[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

A. *Plaintiff's Promotion and Retaliation Claims*

In order to establish her *prima facie* case for discriminatory denial of a promotion, plaintiff must prove

> (1) that she belongs to a protected class; (2) that she applied for and was qualified for the position at issue; (3) that she was denied the position sought; and (4) that the denial occurred under circumstances giving rise to an inference of discrimination based on plaintiff's membership in that class.

Stern v. Trustees of Columbia Univ., 131 F.3d 305, 311-12 (2d Cir. 1997).

In an action involving a retaliation claim the same analysis set forth in *McDonnell Douglas* is used. The first burden of proof is on the plaintiff to make a *prima facie* showing of

retaliation. In order to satisfy this burden plaintiff must show "(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996).

It is undisputed that plaintiff, a black woman over the age of 40 of partial Panamanian descent, belongs to a protected class. It is further undisputed that plaintiff applied for and was denied all of the positions discussed above. Plaintiff's primary argument with respect to each of those positions is that she was qualified for such positions and was only denied the positions because of alleged discriminatory or retaliatory intent. Before addressing each position individually, I note the Court's summary of certain applicable law in *Coleman v. Prudential Relocation*, 975 F. Supp. 234, 239 (N.D.N.Y. 1997):

> The laws prohibiting discrimination in employment were "not intended to transform the courts into personnel managers." The Second Circuit has reminded district courts that they do not have a "roving commission to review business judgments," and that they "must refrain from intruding into an employer's policy apparatus or second-guessing a business's decision-making process."

Id. at 239-40 (citations omitted). Plaintiff's objections to the decisions made by Newsweek amount to a difference of opinion as to her qualifications, and these are business decisions which I am instructed not to second-guess. *See also Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116-17 (2d Cir. 1988); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) ("When a decision to hire, promote, or grant tenure to one person rather than another is reasonably attributable to an honest even

though potentially subjective evaluation of their qualifications, no inference of discrimination can be drawn"). I now address each position in turn.

1. *Associate Editor/Lifestyles Section*

On September 3, 1992, plaintiff applied for the position of Associate Editor of the Lifestyles section but did not receive this job because she was not the most qualified of the candidates interviewed. (Crichton Decl. ¶¶ 10-11). First, plaintiff contends that she was not offered a fair opportunity because the position was offered to Talbot before plaintiff was interviewed. The undisputed facts show that Crichton assumed the responsibility of interviewing candidates in the middle of the process because of her predecessor's resignation. (*Id.* ¶ 4). In the transition, Crichton failed to interview three candidates before hiring Talbot. (*Id.* ¶¶ 6-7). The three candidates included plaintiff and another woman and a man, both younger than plaintiff and Caucasian. (*Id.* ¶ 7). This mistake was quickly corrected, and plaintiff and the two other candidates were in fact interviewed while Talbot performed the job on a temporary basis. (Barish Supp. Decl. ¶ 3). After due consideration, however, Crichton determined that Talbot was the most qualified candidate and offered the position to Talbot on a permanent basis. (Crichton Decl. ¶ 11). Based on these uncontradicted facts, I cannot find any evidence supporting an inference of discrimination in the promotion process.

Second, plaintiff seeks to demonstrate that she met "the criteria that the employer has specified for the position" *Thornley v. Penton Publishing, Co.*, 104 F.3d 26, 29 (2d Cir. 1997), by asserting that the only qualification was a college degree. (Pl. Aff. ¶ 5). While the written posting for this position did state that a college degree was "preferred," plaintiff's assertion that this was the only qualification is belied by the additional criteria, listed in the posting, that stated that the

applicant "[m]ust have the ability to write in a creative, witty and clever manner" on pieces focusing on interesting and newsworthy people and trends in popular culture. (Crichton Decl., Ex. 1).

Plaintiff then challenges Newsweek's decision to promote Talbot, instead of plaintiff, asserting in a conclusory manner that she had, in fact, done work relevant to this position. ("I had written free lance pieces on subjects highly relevant to Lifestyle . . ."; "much of my editing and research had been in areas relevant to popular culture . . ." (Pl. Aff. ¶ 5)). Newsweek claims plaintiff did not have a background in the Lifestyles area since her work at Newsweek consisted mostly of fact-checking and research in the Foreign section. When asked at her deposition the basis of her belief that she was qualified for the position, plaintiff replied

> I've done just one what I would call non-Newsweek newsmaker type article for an African publication in 1984 called Africa Now in which I thumbnailed a few people. I took the great writers' course at Newsweek when it was offered and the instructor showed you how a newsmaker article should be constructed.

(Rose. Supp. Decl., Ex. 1 at pp. 87-88). Based on plaintiff's own words, she was not qualified for the position and, therefore, cannot establish a *prima facie* case.

Even if I find that plaintiff has made out her *prima facie* case, Newsweek has offered a legitimate, nondiscriminatory reason for not promoting James. The other candidate, Talbot, was clearly more qualified. It is undisputed that Talbot had reported on and written several pieces on fashion and trends for the Lifestyles section, had performed well as a bureau intern where she gained writing and reporting experience, pitched good story ideas, and had expressed a particular

interest in the Associate Editor position. (Crichton Decl. ¶ 11). Plaintiff has offered no evidence from which a jury would find that defendant's proffered reason for its decision to hire Talbot and not her is pretextual or was tainted by discrimination.[5]

2. *1993 Bureau Internship*

For substantially the same reasons as above, plaintiff has not made her *prima facie* case because she has not demonstrated that she was qualified for this position and has not proffered any evidence from which a jury could infer that Newsweek's announced reasons for denying her an internship were pretextual or were tainted by discrimination. Although plaintiff complains that there were no written criteria for choosing interns, Slate, one of the decisionmakers (Slate Aff. ¶ 7), described the qualities sought in detail without contradiction by plaintiff. (*Id.* ¶ 8). Plaintiff argues that she "did exemplary work, had three by-lines for important stories she researched and helped write, made specific proposals for innovative, culturally related coverage and was in active and positive collaboration with her colleagues." (Pl. Opp. Mem. at pp. 6-7). Again, plaintiff's conclusory assertions are contradicted by the detailed submissions made by Newsweek, beginning with early and undisputed documentation of plaintiff's erratic and unsatisfactory work habits. (Barish Supp. Decl., Ex. 1 (May 24, 1985, November 1, 1985 and March 17, 1986 memoranda to plaintiff detailing her unsatisfactory performance)). The detail continues in the concerns expressed by Shabad who, after indisputably working with plaintiff for

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[5] Plaintiff asserts that when Talbot left the Lifestyles job in 1993, she "was not given the opportunity to try out for the position or an interview." (Pl. Aff. ¶ 6, pp. 5-6). Again, plaintiff's conclusory statement is belied by the undisputed documentary evidence — the November 3, 1993 posting for the position (Ex. 2 to Barish Supp. Decl.) and Barish's undisputed statement that plaintiff did not apply for the position in 1993. (Id. ¶ 4).

twenty-two years, told Slate that plaintiff's job performance was "erratic" and at times she was "careless and unreliable." (Shabad Decl. ¶¶ 3-4). He also stated that James was at times "unresponsive and demonstrated a lack of understanding about the issues at hand." (*Id.*).

In response, plaintiff contends that the seven persons awarded internships were all under age 40 and, therefore, she claims age-based discrimination.[6] The law is clear, however, that promotion of younger workers instead of older workers does not, without more, prove discrimination. *See Suttell v. Manufacturers Hanover Trust Co.*, 793 F. Supp. 70, 73-74 (S.D.N.Y. 1992) (mere fact that younger, less-experienced employee assumed plaintiff's former duties after plaintiff was terminated was insufficient to give rise to inference of discrimination); *Coleman*, 975 F. Supp. at 242 (replacement by a younger person may be enough to satisfy the fourth element of plaintiff's *prima facie* case, but it is not enough to create an issue of fact about pretext). Even assuming that this evidence permitted plaintiff to satisfy her *prima facie* case, it then shifts the burden to the defendant to provide a legitimate, nondiscriminatory reason for not promoting plaintiff.

Slate based his decision on his own personal knowledge of plaintiff's work, including his review of reporting files that she submitted, Shabad's evaluation of plaintiff over twenty-two years and Cooper's expression of concern about plaintiff's job performance and work habits. (Slate Decl. ¶ 9; Shabad Decl. ¶¶ 3-4). Slate's inquiry revealed that plaintiff's fact-checking and proofreading was often careless and unreliable, and she resisted assisting other sections of the magazine. When Slate questioned plaintiff about her research, he found that her answers were at times unresponsive and demonstrated a lack of understanding about the issues at hand. (*Id.*).

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[6] Of the seven candidates selected, five were Caucasian, one was Asian, and one was Black. (Slate Aff. ¶ 10).

Furthermore, James had an erratic record of availability and was often not at her desk when needed. (*Id.*). Plaintiff states that she "disputes criticism of her work habits and reporting skills" (Pl. 56.1 St. ¶ 32), but this unsupported conclusory statement provides no basis from which a jury could infer pretext or discrimination. Thus, Newsweek has met its burden of proffering a legitimate, nondiscriminatory reason for denial of an internship to plaintiff.

In seeking to show that the decision was pretextual and/or tainted by discrimination, plaintiff argues that Cooper made racist remarks to plaintiff, specifically, that Cooper asked her if she didn't like colleague Mark Whitaker because he was not "black enough." (Pl. Depo. at 133). For purposes of this motion, I must assume that this remark was made. Nevertheless, James has failed to raise an issue of fact as to whether the proffered reasons for denying her an internship were pretextual and that the real reason for Slate's actions was because he intentionally discriminated against James. First, as a matter of law, a single stray remark does not establish the existence of a material issue of fact warranting the denial of a motion for summary judgment. *See, e.g., O'Connor v. Viacom Inc./Viacom Int'l Inc.*, No. 93 Civ. 2399 (LMM), 1996 WL 194299, at *5 (S.D.N.Y. April 23, 1996) (holding that three isolated remarks were insufficient to establish pretext and observing that "[m]any courts have held that stray remarks in the workplace, by themselves, and without a demonstrated nexus to the complained of personnel actions, will not defeat the employer's motion for summary judgment") (collecting cases), *aff'd*, 104 F.3d 356 (2d Cir. 1996); *see also Lacoparra v. Pergament Home Centers, Inc.*, 982 F. Supp. 213, 225 (S.D.N.Y. 1997) (following *O'Connor* and collecting other recent cases to the same effect).

Second, Cooper was not the decisionmaker with respect to James's promotion. It is undisputed that that decision was made by Slate, and thus any remark by Cooper is insufficient

to create an issue of fact. *See Legendre v. Chase Manhattan Bank*, No. 94 Civ. 2911 (JES), 1996 WL 514874, at *6 (S.D.N.Y. Sept. 10, 1996) (granting summary judgment to employer in Title VII case where employee relied upon isolated remarks and reasoning, in part, that remarks were made by individuals who did not play a role in the termination); *see also Boyle v. McCann-Erickson, Inc.*, 949 F. Supp. 1095, 1102 (S.D.N.Y. 1997) (same reasoning and result in an ADEA action); *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 402 (7th Cir. 1997) (stray remarks by non-decision-makers do not create material issue on question of pretext), *cert. denied*, 118 S. Ct. 1795, 140 L.Ed.2d 936 (1998).

Plaintiff also claims that Slate's decision was in retaliation for plaintiff's filing of a charge of discrimination with the EEOC. Again, the paper record belies plaintiff's conclusory statement. Plaintiff filed her charge concerning the Talbot promotion in July 1993 (Rose. Decl., Ex. 3), and the internship decisions were made in May 1993 (Slate Decl., Ex. 3), well prior to the filing of the charge. Thus, the indisputable facts show that the charge could not have influenced the internship decision. Accordingly, for all of the reasons stated above, plaintiff has failed to raise an issue for trial as to the 1993 bureau internship position.

3. *State Department Correspondent and Reporter/Nation and Lifestyles Sections*

Plaintiff alleges that she failed to receive the positions of State Department Correspondent and Reporter for Nation and Lifestyles sections in retaliation for having filed administrative Charge I (for her failure to receive the position of Associate Editor of the Lifestyles section). Plaintiff has not proffered any evidence from which a jury could infer that she was denied either position because of retaliation.

First, there is no evidence to support a causal connection between the protected activity (filing an administrative charge in July 1993) and the adverse actions (not being promoted to either position in November 1993). The Court of Appeals has held that "proof of the causal connection can be established indirectly by showing that the protected activity was followed closely in time by the adverse action." *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988); *see also Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990). Here, there was at least a four-month gap between the protected activity and the adverse actions, and this has been found to be insufficient to establish causation. *Hollander*, 895 F.2d at 84-85 (no causation where three and a half months passed between the protected activity and the adverse action). Plaintiff has proffered no other evidence from which a causal nexus can be inferred.

Second, even if plaintiff were able to make out a *prima facie* case, Newsweek is still entitled to summary judgment because plaintiff has proffered no evidence to support an inference that Newsweek's reasons for not promoting her were a pretext for discrimination or retaliation. McDaniel found that James was not qualified for the State Department Correspondent position and that Breslau, indisputably a younger, white woman, was significantly more qualified based on her experience, performance, and recommendations. (McDaniel Decl. ¶¶ 10-12). Breslau's qualifications are not in dispute; she had served overseas in a correspondent position and developed a good working knowledge of U.S. foreign policy. She had performed well as a Newsweek reporter and expressed creative story ideas and demonstrated she knew how to develop and report a story. She was also strongly supported by the members of the Washington Bureau and recommended by the Bureau Chief. (McDaniel Decl. ¶ 12, Ex. 2).

During the interview for the State Department position, McDaniel presented to plaintiff a number of hypothetical situations and asked her how she would report each of them. James replied to each scenario that she would ask her Bureau Chief for guidance. These responses, which plaintiff does not dispute, indicated to McDaniel that James "had only a rudimentary idea, at best, of how to develop and report a story." (McDaniel Decl. ¶ 9). Furthermore, after reviewing plaintiff's application and writing samples, McDaniel concluded that her reporting skills were only basic, her written work was weak and she had little sense of how to develop, package and present a story. (*Id.* ¶ 10). In contrast, Breslau had served as acting Bureau Chief for eight months of the three years during which she was a foreign correspondent. (Barish Supp. Decl., Ex. 7). In addition to her other qualifications discussed above, Breslau's 1993 year-end performance review stated that she was "as hard a worker as one could ask for" and "a fast learner, [who] got more out of a single year than most people would have." (*Id.*, Ex. 8). Thus, Newsweek has proffered a legitimate, non-discriminatory reason for not promoting plaintiff to the State Department position, *viz.*, that Breslau was the more qualified candidate.

In support of her claim, plaintiff points to the September 1993 letter written by McDaniel denying plaintiff's request to participate in the NABJ convention. The letter states that plaintiff's request was denied because, having been received "just four days before [the Convention] began — [it] came much too late in the process for [McDaniel] to grant." (Pl. Aff., Ex. 14). At the end of the letter, McDaniel advises plaintiff that she "appear[s] to have negative feelings about Newsweek" and "[i]f this situation continues, I do not feel you would be an effective goodwill ambassador for Newsweek at NABJ." (*Id.*). Because one of Newsweek's undisputed purposes in sending representatives to the NABJ Convention was to promote the magazine and recruit new minority employees,

McDaniel's letter illustrates sound business reasons for not sending someone who was unhappy about her current employment. (See McDaniel Supp. Decl. ¶¶ 2-3). Plaintiff argues that this letter leads to the inference that McDaniel considered plaintiff's "hostility" when reviewing her application for promotion only a few months after this letter was written. (Pl. Opp. Mem. at 9). First, plaintiff's conclusory argument provides no basis for such a connection. Second, even if such an inference could be drawn, Newsweek has proffered legitimate, non-discriminatory business reasons for denying plaintiff's late request to attend the NABJ conference, and plaintiff has proffered no evidence from which a jury could infer that those reasons or Newsweek's reasons for denying plaintiff promotion to the State Department position were a pretext or that discrimination was the real reason. *See St. Mary's*, 509 U.S. at 515, 113 S. Ct. at 2752.

For the position of Reporter for the Nation and Lifestyles sections, plaintiff complains that she was not given an interview. Plaintiff does not dispute that Newsweek personnel left messages for her both at home and at work during her early December 1993 through January 12, 1994 vacation (McDaniel Decl. ¶ 18); she only states that she did not receive the messages left at home and that she could not retrieve the messages left at work (Pl. 56.1 St. ¶ 61).

As to this position, McDaniel was again the decisionmaker and, even though she was unable to interview plaintiff specifically for this position due to plaintiff's undisputed absence on a lengthy vacation, she was fully aware of plaintiff's qualifications, because McDaniel had just dealt with plaintiff's application for the State Department position. (McDaniel Decl. ¶ 18). McDaniel concluded that plaintiff was not qualified for this position in that she lacked the necessary writing and reporting skills (*id.*) and instead promoted Patrick Rogers. As to Rogers, McDaniel

> believed that [he] had shown extraordinary researching and writing skills for a Senior Researcher with his years of experience; he had demonstrated throughout his reporting internships and other reporting assignments that he could report and write stories; he was enthusiastically supported by Newsweek Editors and Senior Editors; and [McDaniel] was impressed with the writing and reporting work that he had done directly for [her].

(*Id.* ¶ 19). Plaintiff does not dispute Rogers' qualifications but argues only that she had more years of experience than Rogers. Her belief, that years of experience trump her employer's evaluation of the respective candidates' reporting skills, is not enough to establish a *prima facie* case. Newsweek's evaluation, based on undisputed facts, is a business judgment that I may not second guess. In any event, plaintiff has offered no evidence from which a jury could infer pretext or retaliation.

Furthermore, the above analysis is exactly the same with respect to plaintiff's theory of discrimination on these promotion claims. Plaintiff cannot meet her burden of proving a *prima facie* case and, even if she could, she has not offered any evidence of pretext in the face of Newsweek's legitimate, nondiscriminatory reasons for denying James a promotion in either of the above positions. Accordingly, I find that denying plaintiff the above positions was not a pretext for discrimination or retaliation but a legitimate and nondiscriminatory business decision.

4. *Summer 1994 Positions*

As discussed previously, plaintiff alleges for the first time in her complaint that she was not selected for the positions of Writer/Lifestyle Trends, Researcher, Washington, D.C. Bureau and Society/Education Writer under theories of retaliation

and discrimination. Plaintiff's retaliation theory fails for the same reason as above: the time between filing the charge of discrimination (filed in July 1993 and March 1994) and the adverse employment decisions (in August 1994) is too lengthy to suggest a causal relationship and support a *prima facie* case. *See Hollander*, 895 F.2d at 83; *Manoharan*, 842 F.2d at 593.

Plaintiff's discrimination claims fare no better. Even if I found that plaintiff had established a *prima facie* case, she has not proffered any evidence from which a jury could infer pretext. At the time plaintiff applied for these positions, she was on probation, and other, more qualified candidates were chosen for each position. Michel Marriott, a forty year-old black male, was selected for the Writer/Lifestyle Trends position. (Barish Supp. Decl. ¶ 9, Ex. 10). This position involved extensive on-the-street reporting and required a candidate who was versatile, street-smart, comfortable with pop culture and equally at home picking up on "official" lifestyle trends and "alternative" trends. (Barish Decl., Ex. 1). At the time he was selected, Marriott had been a Metro reporter for *The New York Times* for seven years and had written frequently in the prior two years about urban culture for the Styles section of *The Times*. (Rose. Decl., Ex. 13).

Lynnell Hancock, over forty years old, was selected for the Society/Education Writer position. (Barish Supp. Decl. ¶ 9, Ex. 11). This position required extensive reporting and writing experience on education policy, school politics, child development and child psychology. (Barish Decl., Ex. 1). Hancock was an Assistant Professor at the Columbia University School of Journalism and had more than ten years experience as an education writer and reporter. (Barish Supp. Decl. ¶ 9, Ex. 11; Rose. Decl., Ex. 15).

Lucy Shackelford was selected for the Washington, D.C. Researcher position. (Barish Supp. Decl. ¶ 9, Ex. 12). The

requirements for this position included extensive research experience and in-depth knowledge of the Washington political scene. (Barish Decl., Ex. 1). Shackelford had worked at the *Washington Post* as Bob Woodward's researcher and had shown herself to be "extraordinarily good at computer-assisted research and all areas of more traditional research." (McDaniel Decl. ¶ 31). Accordingly, assuming plaintiff made out a *prima facie* case as to each of the summer 1994 positions, defendant has rebutted that *prima facie* case with legitimate, non-discriminatory reasons for denying James those positions and giving them, instead, to clearly more qualified candidates. Plaintiff does not dispute the other candidates' qualifications, only her employer's evaluation of them — evaluations I may not second guess. Because plaintiff has not proffered any evidence from which a jury could infer pretext, summary judgment is granted to Newsweek on this claim.

B. *Termination Claims*

Plaintiff also claims that her discharge on December 10, 1994 was discriminatory based upon her sex, race, color, age and disability as well as in retaliation for her filing of earlier charges of discrimination. As stated above, I do not have jurisdiction to determine plaintiff's claims under her theories of sex and disability because these theories were not exhausted at the administrative level and are not "reasonably related" to the previous administrative charges.

As for plaintiff's other theories of discriminatory discharge, her claims must fail as a matter of law. In order to establish a *prima facie* case, plaintiff must show that (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination based on her membership in that class. *Chambers*, 43 F.3d at 37. In order to show she was qualified for the position from which she was discharged, plaintiff must show that she was

satisfactorily performing the job at the time of discharge. *See Thornley*, 104 F.3d at 29; *see also Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995); *Chambers*, 43 F.3d at 37; *Song v. Ives Lab., Inc.*, 957 F.2d 1041, 1045 (2d Cir. 1992). "Whether job performance was satisfactory depends on the employer's criteria for the performance of the job — not the standards that may seem reasonable to the jury or judge." *Thornley*, 104 F.3d at 29.

Here, plaintiff cannot meet her burden because she has not shown that she was satisfactorily performing the functions of her job. Plaintiff claims that she was unfairly placed on probation in July 1994.[7] Defendant has shown, however, that James was placed on probation only after several attempts to get her to address the various problems with her performance including, but not limited to, her carelessness, inadequate and incomplete responses to Barbi letters (internal inquiries concerning possible errors in the Magazine (Slate Decl. ¶ 20)) and resistance to meeting with her superiors to discuss her performance. (McDaniel Decl. ¶ 25, Exs. 5, 6). Slate and McDaniel made numerous attempts to meet with plaintiff and, despite plaintiff's efforts at avoiding such encounters,

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[7] In Part II.B., *supra*, I found that plaintiff's claim that she was unfairly placed on probation in July 1994 was "reasonably related" to the underlying administrative charges, such that it may be deemed exhausted and, accordingly, over which I have subject matter jurisdiction. Here, Newsweek has demonstrated a legitimate non-discriminatory reason for placing James on probation, *viz.*, her supervisors' detailed evaluations of her work and attitude. (*See, e.g.*, Slate Decl., Ex. 12; McDaniel Decl., ¶¶ 22-45, Ex. 5; Barish Decl. ¶¶ 15-17, 20-23, Exs. 2, 3, 5). Plaintiff's conclusory statements and limited denials of selective details, *e.g.*, plaintiff's denial of McDaniel's recounting of plaintiff's swinging a microphone around McDaniel's head and at McDaniel during plaintiff's undisputed tape recording of the December 9, 1994 meeting, but admission that the meeting ended with plaintiff's leaving the room and slamming the door (Pl. Aff.¶ 17), are insufficient to raise an issue of pretext or discrimination. Accordingly, judgment for Newsweek is warranted on this claim.

did have several meetings with her to offer her assistance, but she showed little improvement. (Slate Decl. ¶¶ 15, 16, 20-21, 24; McDaniel Decl. ¶¶ 21-25, 32-33, 36-37, 40-43). Plaintiff's reviews speak for themselves: on February 25, 1994, plaintiff received her 1993 Employee Performance Review[8] and was advised that her work performance was "mostly adequate, occasionally good and occasionally inadequate." (Slate Decl., Ex. 12). The review also advised that her responses to Barbi letters reflected a "mechanical and superficial approach to [her] research duties as well as a misunderstanding of the role of the researcher in Newsweek's editorial operation." (*Id.*). The review went on to alert plaintiff to the "lack of confidence" her writers and editors had in her research which was "thin" and unreliable. (*Id.*). The review also addressed her "unwillingness to speak with [Slate] and [her] head researcher" about her performance. (*Id.*). Plaintiff's 1994 review, dated December 7, 1994, acknowledged that she showed "a slight bit of improvement" but nonetheless described her efforts as "superficial and careless." (McDaniel Decl., Ex. 11). It went on to admonish plaintiff for not responding to Barbis, not taking responsibility for mistakes, and not gathering

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[8] Plaintiff asserts that the February 1994 evaluation did not reflect her job performance (Pl. Aff.¶ 9) and was an act of discrimination and retaliation for her first administrative complaint. Under a liberal reading of *Butts*, I have jurisdiction over this claim because I found it was exhausted under a "reasonably related" standard. As plaintiff's supervisor, Slate provided her a year-end review of her work, albeit without a meeting in person, because Slate contacted plaintiff three times to pick up the review and received no response. (Slate Decl., Ex. 12). The review specifically cites, *inter alia*, the erratic nature of plaintiff's work, the unreliability of her work, the lack of confidence her writers and editors have in her research and her unwillingness to speak to neither Slate or her head researcher about her work. (*Id.*). Plaintiff has not proffered any evidentiary material from which a jury could infer that this review was pretextual, discriminatory or retaliatory. Thus, Newsweek has proffered legitimate non-discriminatory reasons supporting the 1994 evaluation of plaintiff's work. Accordingly, judgment for Newsweek on this claim is granted.

information to answer all Barbis. (*Id.*). The review advised plaintiff that she would "remain on probation because [her] overall performance [was] unsatisfactory and must be improved further if [her] employment [at Newsweek was] to continue." (*Id.*). Again, the paper record demonstrates that plaintiff was not performing satisfactorily according to the criteria set by her employer in the exercise of its business judgment. The Court of Appeals has exhorted the district courts that "they do not have a 'roving commission to review business judgments'" *Coleman*, 975 F. Supp. at 239, and plaintiff's conclusory assertions of competence provide no basis for such a review on summary judgment. The record also demonstrates, without contradiction, that plaintiff was advised of her unsatisfactory performance and did not take the opportunity to improve her performance. ("All of these mistakes occurred several months ago and we should have discussed them then. But you refused. You postponed and cancelled some meetings and walked out of others. On the few occasions you agreed to talk, you constantly interrupted others, you rarely seemed to understand the editors' concerns, and in one instance you spoke Spanish even after I told you that I did not understand you. Shabad, writers and editors have all found it virtually impossible to engage you in constructive conversations about your work." (McDaniel Decl., Ex. 11)). Accordingly, plaintiff has failed to establish her *prima facie* case, and summary judgment on this claim is warranted.

Plaintiff's retaliatory discharge claims fail as well. Her discharge was on December 10, 1994, a year and a half after filing her first administrative charge and nine months after filing her second charge. Because the adverse employment action occurred so long after the protected activity, that indirect evidence does not support an inference of a causal connection. *See Hollander*, 895 F.2d at 83; *Manoharan*, 842 F.2d at 593. No other evidence has been presented to support this claim. Accordingly, plaintiff has failed to present a

question of fact for a jury to consider which would preclude summary judgment.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is granted.

The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED:

Dated: New York, New York
October 4, 1999

/s/ Loretta A. Preska

Loretta A. Preska, U.S.D.J.

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

No. 00-165

IN THE

Supreme Court of the United States

AYLEEN JAMES,

Petitioner,

v.

NEWSWEEK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent Newsweek, Inc. ("Newsweek") hereby discloses that it is a wholly owned subsidiary of The Washington Post Company, which is a publicly traded corporation.

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STATEMENT OF THE CASE

A. Proceedings Below

Ayleen James ("James" or "Petitioner") filed a complaint in a New York federal court against Newsweek, Inc. ("Newsweek" or "Respondent") in 1996. Petitioner contended that she had been the victim of discrimination with regard to a variety of employment actions, including promotions, performance reviews and ultimately her termination, under seven different legal theories — race, color, age, sex, national origin, disability and retaliation. [App. A-5].[1] The district court granted summary judgment to Newsweek on each and every claim asserted by Petitioner.

On appeal to the Second Circuit, Petitioner abandoned all but one claim, proceeding only on her claim for retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) ("Title VII"). The Second Circuit affirmed on the grounds that Petitioner did not establish a *prima facie* case of retaliation. Specifically, the court held, in a Summary Order, that Petitioner had not engaged in protected activity under Title VII when she told her supervisor that she did not believe her annual performance evaluation "was fair" and that she was "going to seek justice." [App. A-3]. It is from this judgment that Petitioner now seeks review.

B. Statement of the Facts

Petitioner was hired by Newsweek, publisher of the weekly news magazine *Newsweek*, in 1972 as a Researcher

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1. "App." refers to the Appendix to James' Petition for Writ of *Certiorari*.

(Editorial Assistant). [JA 75 ¶ 3].[2] In 1980, she was promoted to Writer/Researcher (Senior Editorial Assistant), the position she held until her discharge on December 10, 1994. [*Id.*]. At all times, Petitioner was covered by a collective bargaining agreement between Newsweek and the Newspaper Guild of New York (the "union"). [*Id.*].

Between 1992 and 1994, Petitioner sought a number of different positions at Newsweek. Her failure to receive the positions motivated her to file two charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On July 27, 1993, Petitioner filed a charge of discrimination with the EEOC and New York State Division of Human Rights ("NYSDHR") alleging that she was denied the position of Associate Editor/Lifestyle section in November 1992 and denied a bureau internship in May 1993 on the basis of race, ethnic background (non-WASP) and age ("Charge I"). [JA 324-25]. After an investigation, the NYSDHR issued a finding of "No Probable Cause" in August 1995. [JA 328-31].

On March 29, 1994, Petitioner filed a second charge of discrimination with the EEOC alleging that she was denied promotions in late 1993 to the positions of State Department Correspondent and Reporter/Nation and Lifestyle sections in retaliation for filing Charge I ("Charge II"). [JA 326]. After an investigation, the EEOC dismissed Charge II in July 1996, finding no violation of the discrimination laws. [JA 332].

Petitioner's discharge in December 1994 was the culmination of a long history of inadequate job performance

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2. "JA" refers to the Joint Appendix filed in the Court of Appeals.

and refusal to communicate with her superiors in a constructive manner about her work. In both 1985 and 1986, Petitioner was placed on probation by her supervisor, Annabel Bentley, due to her performance. [JA 674 ¶ 2; JA 678-81]. Between 1990 and 1993, Petitioner's work habits and attitude were the subject of numerous meetings and written communications with her supervisor at the time, Ted Slate. [JA 94-102, JA 119-143; JA 252-62; JA 709-26].

On June 1, 1994, Petitioner met with her new supervisor, Ann McDaniel, to discuss why she had not been selected for a writing internship for which she had applied. [JA 148 ¶ 22]. McDaniel also discussed why Petitioner had not been selected to attend the 1994 National Association of Black Journalists Conference. According to Petitioner, McDaniel told her she was not extended an invitation to the conference because of her "unsatisfactory" performance and a "lack of confidence in her ability to promote Newsweek, Inc." [JA 760].[3] Toward the end of this meeting, Petitioner spoke a few sentences in Spanish to McDaniel "just to get her reaction since she was Chief of Correspondents." [JA 301].

On July 21, 1994, Petitioner was advised in a meeting with McDaniel and others that she was being placed on probation due to unsatisfactory performance. [JA 77 ¶ 12].

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3. The district court concluded that since one of the functions of Newsweek attendees at the conference was to promote the magazine and recruit new minority employees, there were sound business reasons not to send an employee who was obviously unhappy about her employment at Newsweek and thus could not act effectively as a promoter and "good will ambassador." [JA 39-40; 744-45]. Based on these facts, the district court concluded that no inference of retaliation could reasonably be drawn from this event. [App. A-34–A-35].

Petitioner was also advised in writing that unless there was "substantial and sustained improvement," she was in "serious danger of being discharged." [JA 158]. Following the July 21 meeting, Petitioner's superiors attempted to meet with her on several occasions to review her performance, but Petitioner postponed each of the meetings. [JA 78 ¶ 15; JA 83; JA 150 ¶ 32; JA 166; JA 305-06].

McDaniel scheduled a meeting with Petitioner for December 9, 1994 to conduct Petitioner's annual performance review. [JA 151 ¶36]. Petitioner received a copy of the written review in advance of the meeting. [JA 151 ¶ 38]. The written review criticized Petitioner's performance and gave her a clear directive: "Now time is running out. You must continually perform basic research tasks properly and you must discuss your work in a constructive manner or your employment will be terminated." [JA 167-68]. The memo closed with the following: "As before, we continue to be available to you to help improve your performance. I have scheduled our next review session for . . . January 25." [*Id.*].

The review meeting was held on Friday, December 9, 1994 at 5:00 p.m., with McDaniel and her deputy, Jolie Solomon, and was tape recorded at Petitioner's request. [JA 170]. The transcript of the meeting, the accuracy of which Petitioner does not dispute, reflects that Petitioner interrupted McDaniel on numerous occasions, questioned McDaniel's credentials and ability to evaluate Petitioner, was openly mocking and disrespectful of McDaniel, and frequently interjected to discuss irrelevant matters. [JA 170-80].

At several points during the meeting, McDaniel expressed her view that the meeting was not a constructive conversation about Petitioner's work. [JA 170-80]. McDaniel concluded by referring to the final sentence of the written evaluation (prepared and given to Petitioner before the meeting) which indicated that another meeting had been scheduled for January 25. [*Id.*]. The meeting ended with Petitioner delivering a long statement about what she believed were some of her personal journalistic achievements. [*Id.*]. Petitioner left McDaniel's office and slammed the door. [*Id.*].

Following the conclusion of the Friday evening meeting, McDaniel advised Jean Barish, the Vice President of Human Resources, of what had transpired, in particular, her belief that, as in prior meetings, Petitioner had acted in a confrontational manner and was unwilling to accept the criticisms regarding her performance and engage in a constructive dialogue on the subject. [JA 79 ¶ 21; JA 152 ¶ 43].

The next morning, Saturday, December 10, 1994, Petitioner approached Solomon, whom Petitioner admits seemed frightened by her. [JA 368]. While Petitioner's summary judgment affidavit attempted to dispute Solomon's account of the discussion, at her deposition James testified that she had little, if any, recollection of what was said. [JA 314-20].

Solomon's report of the conversation to McDaniel included comments that Petitioner had made derogatory, threatening and insubordinate comments about McDaniel. [JA 193 ¶ 3; JA 153 ¶ 44]. McDaniel then spoke with Barish. [JA 79 ¶ 22; JA 153¶ 45]. After discussing the situation,

McDaniel and Barish believed that Petitioner's conduct that morning and the previous day (December 9), combined with her inadequate job performance over a long period of time, her refusal to engage in constructive discussions about her work and to accept and address their criticisms (conduct which had manifested itself again during the December 9 and 10 discussions), warranted termination. [JA 79 ¶ 22; JA 153 ¶ 45]. Later that day, McDaniel verbally informed Petitioner that her employment was being terminated. [JA 153].

SUMMARY OF ARGUMENT

The opinion of the Second Circuit Court of Appeals at issue here sets forth a rationale that is consistent with the holdings of other courts of appeals. Moreover, the decision is not in conflict with the Supreme Court authority cited by Petitioner as that authority has no application here. Consistent with the decisions of the Second Circuit and other judicial circuits, the court below properly construed Petitioner's statement that her performance review was not "fair" and that she was going to "seek justice" as too vague and ambiguous to support an inference that she was complaining about unlawful discrimination as required in order to maintain a *prima facie* case of retaliation under Title VII. There is no meaningful difference of opinion, much less a square conflict, among the circuits to warrant further review.

Petitioner's claim that the Second Circuit did not conduct an evaluation of the context in which she made her statement is simply wrong. In concluding that Petitioner's statement did not constitute protected activity for retaliation purposes, the court below found that Petitioner's employer could not

reasonably have understood that her statement about her performance review was directed at unlawful discrimination under Title VII.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW DID NOT IGNORE INTER-CIRCUIT OR SUPREME COURT AUTHORITY ON WHAT CONSTITUTES PROTECTED ACTIVITY IN TITLE VII RETALIATION CASES

While recognizing that informal complaints of discrimination can constitute protected activity for retaliation purposes under Title VII, the Second Circuit found, based on the specific facts of this case, that Petitioner's statements were simply too vague and ambiguous to support the inference that she was complaining about alleged discrimination. In reaching this conclusion, the Second Circuit did not, as Petitioner contends, "overlook[ ] inter-Circuit and Supreme Court authority requiring a full examination of the context of an employee's statements in determining whether she engaged in protected activity." [Pet. 6]. The "authority" relied on by Petitioner does not support this proposition and, moreover, has no application here.

For example, Petitioner relies on *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989), and several cases from other circuit courts cited therein, for the proposition that "courts should balance the employee's right to protest discriminatory activity with the employer's entitlement to an efficient workplace." [Pet. 7]. While this is a correct statement of the law, it is irrelevant to the instant case. *Booker* and the authority cited therein address the issue,

not presented in this case, of when an employee's conduct in protest of an unlawful employment practice may lose its protected status because of the manner in which the protest is made. This assessment requires a balancing of the employee's right to protest discriminatory activity with the employer's entitlement to a non-disruptive workplace. This balancing or contextual analysis has nothing to do with the issue of whether the employee's protest was a complaint about alleged discriminatory employment practices — which is the issue in the instant case. In fact, the balancing discussed in *Booker* only occurs after a *prima facie* retaliation case has been established and the employer has offered the manner or effect of the protest as a legitimate, non-discriminatory reason for the adverse action. In contrast, the issue presented in the instant case is whether Petitioner's statements constitute protected activity sufficient to establish a *prima facie* case of retaliation.

Two other circuit cases relied on by Petitioner, *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983) and *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), do not advance Petitioner's case, but rather, support Newsweek's position here. In *Crown Zellerbach*, the Ninth Circuit held that a letter written by several black employees to a customer of their employer complaining about alleged "racism and discrimination" by their employer constituted opposition activity for retaliation purposes. The letter contained express references to alleged "racism" and "discrimination" at Crown Zellerbach Corporation. Thus, the question for the court was a narrow one: whether the letter complained of a specific employment practice. The court found that other parts of the letter, including particularized references to prior complaints about discriminatory employment practices, were sufficient to infer

that the employees were complaining not just about discrimination generally, but about an unlawful employment practice.

Similarly, in *Payne*, there was no question that the employee was protesting about his employer's alleged discrimination against blacks. The issue before the court was whether the protest concerned a discriminatory employment practice as opposed to the discriminatory treatment of customers. The court concluded that there was sufficient evidence in the record to conclude that the protests were aimed, at least in part, at the employer's alleged failure to provide adequate employment opportunities for blacks.

Crown Zellerbach and *Payne* stand in stark contrast to the instant case where Petitioner complained that her performance review was not "fair" and that she was going to "seek justice." Unlike the protests in *Crown Zellerbach* and *Payne*, Petitioner's protest made no reference to discrimination, racism or prior complaints or charges about same. Thus, unlike the protests in *Crown Zellerbach* and *Payne*, Petitioner's protests are simply too vague to constitute opposition to a discriminatory employment practice.

Petitioner's reliance on a series of Supreme Court First Amendment retaliation cases, *Connick v. Myers*, 461 U.S. 138 (1983), *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Waters v. Churchill*, 511 U.S. 661 (1994), is also misplaced. *Connick* and *Rankin* address the unrelated question of when a public employee's speech addresses a matter of "public concern" for First Amendment purposes. In these cases, the context of the statement is critical to the often difficult assessment of whether the public employee is speaking as a

citizen upon matters of public concern or as an employee upon matters only of personal interest. *Connick*, 461 U.S. at 147-48.

In *Waters*, this Court addressed another First Amendment issue which also has no bearing on the instant case: who should determine whether an employee engaged in protected speech on a matter of public concern, the employer or a trier of fact. *Waters*, 511 U.S. at 668. This Court held that the inquiry should focus on what the employer reasonably thought was said by the employee. *Id.* at 677.

II. THE COURT BELOW APPLIED THE PROPER CASE LAW ON PROTECTED ACTIVITY

Contrary to Petitioner's assertion, the Second Circuit applied the proper legal authority in determining whether Petitioner engaged in protected activity. Notably absent from Petitioner's argument is the case upon which the Second Circuit principally relied — *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276 (2d Cir. 1998). In that case, the court held that a female employee did not complain about a discriminatory employment practice when she protested to company officials that two female colleagues were treated more favorably than she and that she was required to work on her male supervisor's personal business. *Id.* at 290-91. The employee contended that her complaints were about alleged gender discrimination, but the Second Circuit disagreed, finding that her protests did not advert to sex bias as a possible reason for the actions at issue and nothing in her protests could reasonably have led company officials to believe that she was complaining of bias. *Id.* at 292.

In holding that Petitioner, like the plaintiff in *Galdieri-Ambrosini*, did not engage in protected activity, the court below relied upon a critical passage from *Galdieri-Ambrosini*: " '[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII.' " [App. A-3–A-4] (quoting *Galdieri-Ambrosini*, 136 F.3d at 292). This very language suggests that the Second Circuit was applying a contextual analysis in assessing whether Petitioner's statements constituted protected activity.

Indeed, the court found the context of Petitioner's protest — receipt of a negative performance review — to be significant in ascertaining the meaning of her statement: "It cannot be expected that employees will be content with negative employment reviews, consider them just and take them lying down." [App. A-3]. This does not lead to the conclusion that an employee will file an EEOC charge because he is dissatisfied with a review. While Petitioner had filed two EEOC charges in the past concerning alleged discrimination in promotions, a fact noted by the Second Circuit, significant time had elapsed (nine months and a year and a half, respectively) since those filings. Further, Petitioner's statement about seeking justice could reasonably have referred to a number of different steps, having nothing to do with alleging discrimination, such as appealing the review to Human Resources or Newsweek's chief executive (steps she had taken on other occasions), protesting to her union representative or filing a grievance with her union under the collective bargaining agreement (which she did later concerning her discharge). [JA 80 ¶ 24; JA 84; JA 169]. Under these circumstances, and absent any reference by

Petitioner — directly or indirectly — that she was being treated unfairly for discriminatory reasons,[4] the Second Circuit was correct in concluding that Petitioner's "veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination." [App. A-3].

III. THE SECOND CIRCUIT'S DECISION WAS CONSISTENT WITH INTER-CIRCUIT AUTHORITY THAT VAGUE AND AMBIGUOUS STATEMENTS DO NOT CONSTITUTE PROTECTED ACTIVITY

In addition to *Galdieri-Ambrosini*, *supra*, upon which the Second Circuit relied, the decision of the court below is in agreement with other circuit court decisions finding that vague and ambiguous protests do not constitute protected activity for Title VII retaliation purposes. These cases include *Booker v. Brown & Williamson Tobacco Co.*, *supra*, a case upon which Petitioner relies. In *Booker*, a black employee contended that his letter to the head of human resources constituted a sufficient "charge" or "complaint" of discrimination and therefore was protected activity. The letter attempted to blame the employee's alleged performance problems on his supervisor. He asserted that remarks the employer had made about him were slanderous, that his subordinates had been forced to discredit him and that his supervisor when referring to black employees had

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4. As the Second Circuit noted, Petitioner not only failed to state that she was being discriminated against, but her statement also failed to indicate which of the many discrimination theories previously asserted by her (race, age, national origin, sex, or retaliation) was being alleged at this time. [App. A-3].

stated that "I don't know if these people can comprehend asset management." 879 F.2d at 1309. The letter also contested the company's complaints about his managerial style and claimed that the complaints about him were the result of "ethnocism." *Id.* at 1309.

The court concluded that the employee was not contesting any unlawful employment practice, but rather was contesting the correctness of a decision made by his employer. *Id.* at 1313. The court went on to state that even if by "ethnocism" the employee meant "discrimination,"

> . . . a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice. An employee may not invoke the protections of [the law] by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation. . . . In our view, such would constitute an intolerable intrusion into the workplace.

Id.

Booker is consistent with the decisions of other circuit courts. *See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 511 & 513 n.4 (3d Cir. 1997) (letter written to company president by group of employees who had previously filed EEOC charges, containing general grievance about changes in working conditions, perceived threat to employees' job security and allegations that manager made derogatory comments about them, did not complain about discrimination

and thus did not constitute protected activity), *cert. denied*, 523 U.S. 1074 (1998); *Coutu v. Martin County Bd.*, 47 F.3d 1068, 1074 (11th Cir. 1995) (employee's written grievance concerning performance evaluation filed with county employer did not constitute protected activity where employee contended only that she worked hard and deserved better rating, notwithstanding prior allegation by employee of racial discrimination earlier in grievance process); *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701 (3d Cir. 1993) (letter written by employee to company's human resources department complaining about unfair treatment in general and belief that less qualified employee was awarded position sought did not constitute complaint of age discrimination for retaliation purposes under Age Discrimination in Employment Act); *Shapolia v. Los Alamos Nat'l Lab.*, 942 F.2d 1033, 1035 & 1035 n.1 (10th Cir. 1993) (general allegations that discharge was in retaliation for filing grievance based on receipt of negative performance evaluation insufficient to state claim under Title VII).

The cases above demonstrate that the analysis of the court below is consistent with authority in other circuits governing the interpretation of an employee's protests in Title VII retaliation cases.

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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